

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION TO DISMISS DENIED: August 21, 2000

GSBCA 15117-TD

THE WRITING COMPANY,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Jerrold Sanders, President and CEO of The Writing Company, St. Louis, MO, appearing for Appellant.

Edward N. Ramras, Office of Chief Counsel, Internal Revenue Service, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **BORWICK**, and **GOODMAN**.

GOODMAN, Board Judge.

This appeal was filed by The Writing Company by notice of appeal dated September 2, 1999, seeking payment of \$50,219.35. The appeal arises from a contract between appellant and the respondent, Department of the Treasury, Internal Revenue Service (IRS). The respondent has filed a motion to dismiss the appeal, alleging that the appellant has not submitted a claim to the contracting officer pursuant to the Contract Disputes Act (CDA), and accordingly, no appealable contracting officer's final decision had been issued, nor can a deemed denial of a claim be implied. We have determined that this Board has jurisdiction, and therefore respondent's motion to dismiss is denied.

Findings of Fact

1. Appellant was the subcontractor under Contract TIRNO-98-C-0041 (the contract) for the rewriting and redesign of IRS computerized notices to taxpayers. The contract was originally awarded on March 3, 1998, as a sole source Section 8(a) letter contract with the Small Business Administration (SBA) as the prime contractor and appellant as the

subcontractor. Appeal File, Vol. 1, Exhibit 1.¹

2. By letter dated February 24, 1999, the contract was terminated for the convenience of the Government by the contracting officer. Appeal File, Vol. 4, Exhibit 1.

3. By undated letter from appellant received by respondent on June 8, 1999, appellant requested payment of various unbilled costs, including project manager overtime charges in the amount of \$113,990.62. Appeal File, Vol. 5, Exhibit 21.

4. Attached to the letter was an invoice dated May 5, 1999, entitled "Adjustments,"² that contained entries for various amounts, including the following:

Quantity	Description	Unit Price	Extension
1.00	Item No. 0010 Material Direct Cost of Supplies not Billed . . .	6,648.00	6,648.00
77.06	Item No. 0001AA Overtime Adjustment . . .	157.50	12,136.95 ^[3]
646.69	Item No. 0001AA Overtime Adjustment . . .	157.50	101,853.68
1.00	Item No. 0001A Invoice #11 Underpayment . . .	3,819.42	3,819.42 ^[4]
1.00	Item No. 0001AA Invoice #12 Underpayment . . .	361.69	361.69

5. The Defense Contract Audit Agency (DCAA) conducted an audit of the appellant's records with regard to the contract during the week of June 14, 1999, and issued a draft audit

¹ The appeal file in this case is designated as follows: Respondent's Initial submission - Volumes 1-5; Appellant's Initial Submission - Volumes 6-7; Respondent's submission of Audit Report and Supporting Invoices - Volume 8.

² This invoice is referred to as "Invoice 18" in the Defense Contract Audit Agency (DCAA) audit report mentioned in this opinion. Letter from Respondent to the Board (Aug. 3, 2000).

³ The sum of this number and the following number (\$12,136.95 + \$101,853.68) equals \$113,990.63, the amount sought for project manager overtime referenced in the DCAA Audit Report.

⁴ The sum of this number and the following number (\$3819.42 + \$361.69) equals \$4181.11, the amount sought by appellant for alleged underpayment of writers.

report on June 24, 1999, which was transmitted to appellant's business manager. Appellant's Motion to Bring Claim 15117-TD Before the Board, Attachment 9. The DCAA subsequently revised the audit report in part on June 25, 1999. Appeal File, Vol. 8, Exhibit 1.

6. The draft audit report read in relevant part:

The purpose of our audit was to determine the allowability, reasonableness, and allocability of direct costs claimed on public vouchers nos. one through eighteen.

. . . The contractor claimed \$113,990.63 for project manager overtime on voucher no. 18. We verified the overtime incurred to the time sheet and found that they were in excess of 40 hours per week. However, we found authorization for only writer overtime in the contract. We question the \$113,990.63 in its entirety. Should the contract be modified to allow the overtime hours incurred for this labor category, we noted that the contractor miscalculated the overtime premium applicable to the hours worked on voucher eighteen. It used the premium rate of \$157.50 which included the basic pay rate of \$105 plus the overtime premium of \$52.50. The amount payable should represent only the applicable overtime premium. For example, if overtime is paid at time and a half, the premium amount would be \$52.50 times 723.75 overtime hours or \$37,996.88. We discussed this with the contractor representative, [appellant's business manager], who concurred with our finding that the premium was incorrectly calculated. . . .

The contractor claimed overtime premiums in the amount of \$4,181.11 for writer overtime on voucher no. 18. These dollars were already included in voucher nos. eleven and twelve. We take no exception to the overtime in voucher nos. 11 and 12 which are for writer hours in excess of 40 hours per week.

We discussed our findings with [appellant's] Business Manager, at an exit conference on 18 June 1999. As directed by your office, a draft of the report was not provided to the contractor for written response. [Appellant's business manager] refrained from formal comment but indicated that he understood our findings.

Appellant's Motion to Bring Claim 15117-TD Before the Board, Attachment 9.

7. Following receipt of the audit report, appellant's business manager wrote a letter dated August 2, 1999, to the contracting officer demanding payment in the amount of \$37,996.88 for project management overtime and \$4181.11 for writer overtime. Appeal File, Vol. 5, Exhibit 12.

8. By letter dated August 26, 1999, addressed to Mr. John T. Smith, contracting officer, appellant's business manager stated:

On June 24, 1999, the Defense Contract Audit Agency completed its audit of The Writing Company's records Since that time, The Writing Company has repeatedly requested payment of amounts that are not in dispute. The first payment was delayed almost two months. The remaining amount is still unpaid.

We also discussed the disputed amount (\$37,996.88 overtime compensation for Ms. Sanders⁵ and \$4,181.11 overtime compensation for writers.) Ethel Carter reiterated her earlier response, stating that IRS was denying our request for overtime compensation. Ms. Sanders then asked Ethel Carter if that was the IRS final decision. Ethel Carter said yes. Ms. Sanders then asked the IRS to provide the Contracting Officer's final decision in writing. Ethel Carter agreed to fax to Ms. Sanders the Contracting Officer's final decision before the day ended. We have not received the correspondence as promised. We therefore request that Ethel Carter provide, in writing, the Contracting Officer's final decision in response to our request for overtime compensation.

Appeal File, Vol. 5, Exhibit 7.

9. By letter dated August 26, 1999, contracting officer Sharon A. Warren stated:

The following is submitted to provide a response to correspondent from the Writing Company dated August 2, 1999. . . .

In the audit report \$119,516.79 was questioned. Of this amount, \$113,990.63 was for overtime for Ms. Jerroll Sanders, President and CEO of the Writing Company. [The contract] authorized overtime for writers only for the period August 14-September 21, 1999 as referenced in bilateral modification 0004 Section B.2. . . . Additionally, this section set a negotiated overtime rate for writers at \$70.71 and did not allow for payment of overtime costs for any other classification of employee. The Writing Company was informed in correspondence dated March 13, 1998 from the U.S. Small Business Administration . . . to obtain written authorization to perform work outside the scope of the contract.

⁵ Ms. Jerroll Sanders, appellant's president and CEO, was also the contractor's project manager for this contract. Appellant explains its allegation that this is the disputed amount as follows:

The initial invoice 18 contained an incorrect calculation of overtime premium for the project manager, as explained . . . [in] the audit report. The Writing Company mistakenly invoiced Respondent for the entire base amount (\$105) plus the overtime premium (\$52.50). Since base costs had already been paid, the Writing Company should have only invoiced for overtime premium.

Letter from Appellant to the Board (Aug. 7, 2000).

Based on the specific language of the modification, overtime costs for Ms. Sanders are denied. The audit report questioned additional funds in the amount of \$4,181.11 for overtime. The calculation used to arrive at this cost was based on time and a half rather than the negotiated overtime rate of \$70.71. The request for additional money for overtime is therefore denied.

. . . While the audit report did not take exception to labor costs billed to this contract, this office takes the following exceptions:

Invoice 12 - \$1,423.36 for overtime costs incurred past the cut off date of 9/21/98 per Mod 0004 para B.2.

Invoice 18 - \$6,648 supplies not billed

The unbilled supply cost of \$6,648.00 cannot be accepted as a direct cost because it has been categorized as an element in your other direct cost.

Appeal File, Vol. 5, Exhibit 6.

10. The contracting officer's letter dated August 26, 1999, was not designated a contracting officer's final decision, nor did it inform appellant of appeal rights. Appeal File, Vol. 5, Exhibit 6.

11. By letter dated August 31, 1999, which also was not designated a contracting officer's final decision and did not mention appeal rights, John T. Smith, Director, Office of Contract Administration and a contracting officer,⁶ wrote to the appellant:

This letter will serve to reaffirm the Government's position concerning your request for additional monies based upon the DCAA Audit Report. Your firm was advised pursuant to the Government exceptions on August 26, 1999, that while the audit report did not take exception to costs billed to the contract that were allocable and allowable, it did stipulate that there were exceptions. These exceptions were overtime costs for the president and CEO, . . . and writer overtime; furthermore, the Contracting Officer took the following exceptions:

Invoice 12 - \$1,423.36 for overtime costs incurred past the cut off date of 9/21/98 per Mod 0004 para B.2.

Invoice 18 - \$6,648.00 supplies not billed. . . .

⁶ While Mr. Smith signed this letter as Director, Office of Contract Administration, the record indicates that he is also a contracting officer, as evidenced by appellant's letters addressed to him in that capacity and other correspondence he signed in that capacity. See, e.g., Appeal File, Vol. 7, Exhibit 93 (Letter from John T. Smith to Appellant (May 12, 1999)).

Our office has provided your firm with the required criteria to obtain a contracting officer's final decision in previous correspondence, dated Aug 19, 1999 on a related issue. Once again, these criteria are found in Subpart 33.2 of the Federal Acquisition Regulation [FAR] and must be met in order for a final decision to be rendered. Your correspondence dated August 26, 1999 fails to meet these criteria.^[7]

Appeal File, Vol. 5, Exhibit 4.

12. Appellant filed a notice of appeal dated September 2, 1999, which read in relevant part:

The Writing Company submitted its final invoice, which contained a number of adjustments. These adjustments were reviewed by the auditor during an audit of The Writing Company's records, which was completed on June 24, 1999. The audit revealed that IRS had disallowed items that were clearly in accordance with the Federal Acquisition Regulation (FAR) including overtime erroneously disallowed by the COTR [contracting officer's technical representative]. In response to the audit, the IRS Contracting Officer verbally agreed to compensate The Writing Company for excess hours worked by the project manager. After the Writing Company filed a claim for reinstatement of the Notice Redesign Contract with the Board of Contract Appeals (GSBCA 15097-TD . . .), the Contracting Officer and her superiors reversed their decision. Subsequently, they denied payment of all remaining adjustments, even those that were clearly authorized by the contract. The Writing Company is appealing to the Board of Contract Appeals to settle a claim for the following amounts: **\$37,966.88** for the project manager's overtime; **\$4,181.11** for Writer overtime premiums that were improperly denied; **\$6,648.00** for supplies not previously invoiced; **\$1,423.36** for overtime hours incorrectly denied by the Contracting Officer's Technical Representative (COTR). This amount totals **\$50,219.35**.

Notice of Appeal at 1-2.

13. Appellant attached to the notice of appeal the letter dated August 31, 1999, from John T. Smith, contracting officer. Notice of Appeal, attachment 1.

⁷ The August 19, 1999, letter stated in relevant part:

[Respondent] does not consider your letter to be a claim as defined in the Federal Acquisition Regulation. Your correspondence makes no specific reference to the payment of money in a sum certain, nor do you seek, as a matter of right, the adjustment or interpretation of specific contract terms, or other relief arising under or relating to the contract. All of the requirements of Subpart 33.2 must be met in order for a final decision to be rendered.

Appeal File, Vol.5, Exhibit 8.

14. On September 24, 1999, the Board held a telephone conference with appellant's president and chief executive officer and respondent's counsel. Respondent's counsel stated respondent's position that appellant had not submitted a claim pursuant to the CDA, so no appealable contracting officer's decision had been issued nor could there be a deemed denial of any claim. The Board suspended proceedings for thirty days and encouraged the parties to discuss the issue of claim submission. Memorandum of Conference (Sept. 24, 1999).

15. On December 3, 1999, appellant filed a pleading in this appeal entitled "Motion to Bring Claim GSBCA 15117-TD Before the Board." The pleading consisted of a narrative motion with twenty-one documentary attachments.

16. On January 8, 2000, appellant sent a document to the Board entitled "Request for Payment of Charges Outlined in Dispute."⁸

Discussion

On April 13, 2000, respondent filed a Motion to Dismiss for Lack of Jurisdiction.⁹ Respondent's motion states in relevant part:

There is no specific claim referred to in the September 2, 1999 [notice of] appeal. The August 31, 1999 letter attached to the appeal as the alleged "Final Decision of the Contracting Officer" is neither a final decision nor written by the contracting officer. The letter reiterates the Government's opinion that [appellant] has not met the criteria for a proper claim and referred [appellant] to FAR 33.2 for guidance.

A review of the appeal file failed to identify any particular piece of correspondence which matches the amount demanded in the appeal. There is a "Narrative of IRS Unbilled Charges"^[10] which contains the same categories of costs as does the appeal, but differs in the amount sought. The narrative requests payment of \$118,171.74 and "explanation of adjustments" totaling \$3,325.45. Attached to the narrative is an invoice dated May 5, 1999 for \$124,819.74.

⁸ This document contained the caption of another case filed by appellant, but the content of the document referred to the subject matter of the instant appeal.

⁹ Respondent's motion also contained a section entitled "Response to Appeal/Request for Payment" which contained a response to the merits of appellant's previous pleading, in the event the Board determined that it had jurisdiction to decide the appeal. We do not address the merits of the appeal in this decision.

¹⁰ Appeal File, Vol. 5, Exhibit 21 - undated but received by respondent on June 8, 1999.

A letter dated August 2, 1999^[11] requests payment for Project Management overtime and alleged underpayment of writer overtime, totaling \$42,147.99. It does not include any other expenses. Both the narrative and the August 2, 1999 letter are signed by [appellant's] business manager. . . , who is not authorized by the contract to sign official documents on behalf of the appellant. Despite repeated requests to Appellant, no such claim was ever filed with the contracting officer.

Based on the January 8, 2000, Request for Payment by the Appellant and the Board's Order of March 13, 2000,^[12] IRS now has sufficient information to identify the sums certain addressed by the appeal. However, many of the specific line items remain poorly identified and unsupported by the documentation. Therefore, it has been impossible for the contracting officer to issue a final decision on these demands.

Respondent's Motion to Dismiss at 2-3.

The legal basis for the respondent's motion to dismiss is stated as follows:

A claim is defined as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract." FAR 33.201.

Under the Contract Disputes Act, "all claims against the government relating to a contract shall be in writing and shall be submitted to the contracting officer." 41 U.S.C. § 605(a) (1994). "[A] final decision by a [contracting officer] on a 'claim' is a prerequisite for Board jurisdiction. . . . ["] A demand for damages which fails to set forth a sum certain is not a claim under the statute. . . . Repeated demands for "final decisions" and the contracting officer's inability to discern what is being requested by flawed demands which do not constitute proper claims do not constitute deemed denials. Jurisdiction is determined by the facts as they exist at the time the appeal was filed Although the "Request for Payment" did clarify the issues somewhat, it did not change the fact no proper claim had been filed. Therefore, the appeal should be dismissed for lack of jurisdiction.

Respondent's Motion to Dismiss at 2-3.

On April 19, 2000, appellant filed a pleading entitled "Request to Deny Respondent's Motion to Dismiss for Lack of Jurisdiction," which reads in its entirety:

¹¹ Appeal File, Vol. 5, Exhibit 12.

¹² This order referenced the amounts sought in the Notice of Appeal.

On December 2, 1999, the Writing Company provided a comprehensive account of all amounts claimed and supporting details validating these claims. Responses to respondents [sic] arguments are discussed at length in the documentation previously provided. We therefore request that the Board deny the Respondent's Motion to Dismiss.

The Board must determine if a claim has been filed pursuant to the Contract Disputes Act, and if so, whether a contracting officer's appealable decision has been issued or whether the claim may be deemed denied.

Appellant in its Notice of Appeal seeks recovery of four amounts in this appeal: \$37,966.88 for the project manager's overtime; \$4181.11 for writer overtime premiums that were allegedly improperly denied; \$6648.00 for supplies not previously invoiced; and \$1423.36 for overtime hours allegedly incorrectly denied by the contracting officer's technical representative. These amounts total \$50,219.35. Finding 12.

The evidence is clear that these amounts were invoiced by the appellant prior to the DCAA audit and made subject to the audit, and thereafter the Government denied payment for same, because the amounts for project management and writer overtime were questioned by the auditor and the amounts for unbilled supplies and overtime hours were questioned by the contracting officer. Thereafter, the appellant requested payment for these amounts, and also requested a contracting officer's final decision if payment was not forthcoming.

Under similar circumstances, when amounts were invoiced prior to audit, questioned during and after an audit by the government, and later demanded by the contractor, this Board, in Kleen-Rite Corp., GSBCA 5893, et al., 83-2 BCA ¶ 16,582, found that a contractor had submitted a claim:

Appellant's invoices assert entitlement to certain reimbursements under the contract, which the Government pays. Later, the Government, after audit, concludes that it overpaid. The Government informs the contractor in writing of the alleged overcharges and, even though the contractor objects, takes back what it regards as its money by reducing the amount it pays the contractor against other invoices. When the contractor renews its objection, the contracting officer issues a decision stating that the deductions were properly taken because the determination of the overcharges was correct. Does the 'claim' consist of the original invoices (to the extent disputed), or the first Government letter asserting that there has been an overcharge, or the contractor's objection, or the act of withholding payments from other contracts, or the renewal of the objection, or the contracting officer's decision itself? A case can be made for any of them.

83-2 BCA at 82,470.

With regard to the Government's argument in Kleen-Rite that the contractor failed to assert a claim, the Board stated:

We think the Government's argument goes too far. Section 6(a) of the Contract Disputes Act of 1978, 41 U.S.C. § 605(a), says only: 'All claims by the contractor relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision.' If something submitted to the contracting officer that lacks an express demand for a decision is in all other respects manifestly a claim, the act of submission is itself the demand for a decision, since the Act requires the contracting officer to decide claims submitted to him, and Sections 6(c)(1) and (2) even establish time frames. Appellant obviously disagreed with the audit disallowances. It so informed the contracting officer, who nevertheless took credits on account of those disallowances against sums otherwise due appellant. The contracting officer knew appellant wanted to be paid that money; he did not pay appellant that money; both parties knew why he did not pay appellant that money; appellant disagreed with the contracting officer's reasons; and appellant told the contracting officer in writing of its disagreement.

83-2 BCA at 82,470-71.

This scenario in Kleen-Rite is similar to the instant case, except that in Kleen-Rite the appellant failed to specifically request a contracting officer's final decision. The Board held that submission of the request for payment of the disputed amount implied a request for a contracting officer's final decision. In the instant case, the appellant requested in writing a contracting officer's final decision for the two amounts which it knew were disputed, at the same time requesting payment for amounts which it believed were undisputed which the Government knew at the time were disputed.

A careful review of the facts in the instant case clearly shows that appellant submitted a valid claim pursuant to the CDA. The four amounts sought in the Notice of Appeal were demanded in writing, by invoice prior to the DCAA audit: \$37,966.88¹³ - invoice 18; \$4181.11 - invoices 11, 12, and 18; \$6648 - invoice 18; \$1423.36 - invoice 12. Findings 4, 6, 9, 11.

These first two amounts, \$37,966.88 and \$4181.11, were disputed during the audit process by the auditors in the audit report, Finding 6, and the appellant subsequently requested payment for these sums by its letters dated August 2 and August 26, 1999. Findings 7, 8. Appellant's letter of August 26, 1999, specifically requested a final decision of the contracting officer with regard to the request for overtime payments for \$37,966.88 and \$4181.11. Finding 8. Both the August 2, 1999, letter and the August 26, 1999, letter were clearly claims for these two amounts.¹⁴ Sums certain were stated, and no certification

¹³ The initial amount requested for this item, \$113,990.63 in invoice 18, was addressed in the audit report. Apparently, the contractor reduced its demand to \$37,996.88 pursuant to a calculation in the audit report. Finding 8.

¹⁴ Respondent states in its motion that "Both the narrative and the August 2, 1999 letter are signed by [appellant's] business manager. . . , who is not authorized by the contract to sign official documents on behalf of the appellant." Respondent's Motion to Dismiss at 2-3.

pursuant to the CDA was required, as the amounts totaled less than \$100,000. Even though there was no explicit request for a contracting officer's decision in the August 2, 1999, letter, such a request is implied by the demand for payment. Kleen-Rite; see also Atlas Elevator Co. v. General Services Administration, GSBCA 11655, 93-1 BCA ¶ 25,216. The August 26, 1999, letter did request a contracting officer's final decision.

The amount of \$6648 was requested in invoice 18, Finding 4, and the amount of \$1423.36 was requested in invoice 12, Findings 9, 11. No exception was taken to these amounts by the auditors. Finding 6. After the audit, appellant verbally requested payment of amounts it believed were not in dispute, and also requested payment of these sums in writing in its August 26, 1999, letter. Finding 8. Even though appellant believed these amounts were undisputed when it wrote the letter, the Government knew they were disputed, as evidenced by the exceptions to these amounts stated in the contracting officer's letter of the same date. Finding 9.

We find that the appellant's letter of August 26, 1999, which contained a request for payment of amounts which it believed to be undisputed, which were in fact disputed by the Government, was a claim pursuant to the CDA for those amounts, since the same letter included an explicit request for a contracting officer's final decision for amounts the appellant believed were in dispute. Accordingly, we find that the appellant's letter of August 26, 1999, was also a claim pursuant to the CDA for the two sums of \$6648 and \$1423.36.

The contracting officer's letter of August 26, 1999, to appellant in the instant case clearly and unequivocally denied payment of all four amounts sought by appellant in this appeal. It was written in response to the appellant's August 2, 1999, letter, so that it specifically responded to the claim for the amounts of \$37,966.88 and \$4181.11. While this letter was not designated as a contracting officer's decision and did not contain the required statement of appeal rights, Findings 9, 10, such a clear denial has been held to be a valid contracting officer's final decision. Habitech Inc., ASBCA 26388, 82-1 BCA ¶ 10,411. The failure to include appeal rights in such a determination does not bar the appellant from proceeding with the appeal, as such formalities as to content are for the benefit of contractor. Trans-Atlantic Industries, Inc., GSBCA 10803, 91-1 BCA ¶ 23,412 (1990). We find this letter to be a contracting officer's appealable final decision with regard to the claim for the project management overtime in the amount of \$37,966.88 and writer overtime in the amount of \$4181.11.

Was the contractor officer's letter of August 26, 1999, a final decision with regard to the claims for \$6648 and \$1423.36? We do not know if that letter was in response to the appellant's letter of the same date which requested payment of what appellant believed were undisputed amounts, even though the contracting officer's letter referenced these two amounts as disputed and denied payment of same. We need not determine if the letter of

It is not for the Government to determine who has authority to submit a claim. The CDA's requirement that a certification (for claims of more than \$100,000) include a statement "that the certifier is duly authorized to certify the claim on behalf of the contractor," 41 U.S.C. § 605 (c) (1), does not pertain to submission of the claim. Obviously appellant's president and CEO delegated authority to write the letter to the business manager.

August 26, 1999, was an appealable final decision as to these amounts, because the respondent's next letter of August 31, 1999, signed by John T. Smith, a contracting officer, acknowledged appellant's claim for payment of all four disputed amounts (even though it denied that such claims were sufficient under the CDA), and reiterated the previous denial of the four disputed amounts. Finding 12. While this letter also was not designated as a contracting officer's decision and did not contain the required statement of appeal rights, Finding 11, we find such a clear and unequivocal denial of the appellant's claim a valid contracting officer's final decision with regard to the four amounts claimed by appellant.

Accordingly, claimant submitted a valid claim, requested a contracting officer's final decision, and received appealable contracting officer's final decisions with regard to the four amounts sought in this appeal.

Decision

Respondent's motion to dismiss for lack of jurisdiction is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ANTHONY S. BORWICK
Board Judge